

Comments on HB 5193

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Some caveats

I was only asked yesterday by Sally Steiner to offer comments on this bill. I had not paid much attention to the text before, so my remarks are not as complete as I would like.

At this moment, I can only speak for myself. I have participated in many organizations, especially entities of the State Bar of Michigan. I am a former chair of both the Elder Law and Disability Rights and the Consumer Law sections of the State Bar. I was a special advisor to the Governor's Task Force on Elder Abuse. I only began writing these remarks late last night and have not been able to confer with others. Thus, my remarks cannot be attributed to any group I am affiliated with.

Financial abuse of vulnerable people and the elderly is an increasingly familiar problem. Incidents are increasing as is recognition of the problem and actions by various bodies, both governmental and nongovernmental. The legislature is to be commended for seeking improved ways to address the problem. This is not a partisan issue. Persons with different perspectives may offer somewhat different solutions, but no one should be willing to ignore the massive theft and loss of dignity that accompany exploitation.

The essence of what this bill does is good. I support it in principle, but changes are needed in the details. It clarifies what financial exploitation is. The current statute is quite terse:

Exploitation means an action that involves the misuse of an adult's funds, property, or personal dignity by another person. § 400.11(c)

I have my understanding of what misuse of an adult's funds, property, or personal dignity would mean and it is quite expansive. I can understand that others might have a much narrower view. Clarification and elaboration within the statute would certainly be helpful. The definition ought to remind people of the full range of bad actions that can constitute exploitation.

It is helpful to elaborate about how deception and intimidation can be a component of exploitation and to give non-exhaustive examples of deception and intimidation. The bill does that. All of this is good.

Nevertheless, there are several facets of this bill that need to be changed.

The definition of financial abuse is much too narrow:

Financial exploitation means the action of a person in a position of trust or confidence and who by intimidation or deception knowingly takes control, title, use, or management of an incapacitated or vulnerable adult's assets or property with the intent to permanently deprive that incapacitated or vulnerable adult of his or her asset or property.

There are many issues:

- ❖ The exploiter need not be a person in a position of trust or confidence. Such a status might aid an exploiter, but exploiters can be strangers. Others, such as cleaning ladies, would not be in a position of trust. There is simply no need to limit exploitation to certain classes of people. I have no idea what a *de facto* guardian might be. It is not clear how to interpret the term *fiduciary*. Much exploitation is by agents under powers of attorney but they are not fiduciaries under the Estates and Protected Individuals Code.
- ❖ The intent might not be to permanently deprive. Many exploiters convince themselves that they are only "borrowing" the money and will replenish the property when times get better.
- ❖ The definition does not include theft by stealth or force. Intimidation and deception are not the only ways to steal. Taking money out of a drawer needn't involve either. It really doesn't matter how the crime is perpetrated.
- ❖ Exploitation, as in section 174a of the penal code, ought to include attempts that failed to succeed rather than limiting it to situation where control, title, use, or management is actually obtained. 174a is much broader:
A person shall not through fraud, deceit, misrepresentation, or unjust enrichment obtain or use or attempt to obtain or use a vulnerable adult's money or property.

That covers the bases.

Intimidation also ought to be broadened. The most significant threats to many vulnerable or elderly people are threats of institutionalization in a nursing home or the imposition of guardianship or conservatorship.

It would also help to mention forced isolation as a form of abuse. Isolating an elderly or vulnerable adult from family and friends is a technique commonly used by abusers and exploiters. Enforced isolation ought to be a reportable event *per se* instead of having to wait for the plan to succeed in causing other harm.

I encourage you to make corresponding changes in other laws, especially in the penal code. It wouldn't make sense to make a reportable form of abuse something that cannot readily be prosecuted. For example, the definition of extortion should include threats of a nursing home or a guardianship.

I wish I had been able to offer these constructive suggestions earlier, but now is better than never. I urge you to improve the bill and enact it.